Ketua Pengarah Hasil Dalam Negeri v Lai Keng Chong & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01–211 OF 2010
ABDUL MALIK ISHAK, APANDI ALI AND BALIA YUSOF JJCA
30 JANUARY 2012

Revenue Law — Income tax — Business income — Respondents found to have under-declared income for certain years — Notices of additional assessments issued based on 22% gross profit ratio ('GPR') — Figure based on respondents' first tax returns and upheld by Special Commissioners for Income Tax — Respondents' records incomplete to argue for lower GPR — High Court reduced GPR to 8% on appeal — Whether court had basis for reduction — Whether earlier figure just and appropriate and evidence-based

The respondents had submitted their business income tax returns to the appellant, Director General ('the DG') for the years of assessment 1998 to 2001 ('years of assessment') declaring their gross profit ratio ('GPR') for the respective years of assessment to be 28.33%, 26.84%, 16.79% and 15.81%. A field audit conducted by the DG on the respondents found they had under-declared their income for the years of assessment. The audit also revealed the respondents had not kept proper and complete records concerning their business transactions for the years of assessment; that they had failed to declare certain income received and that monies deposited into their bank account were of bigger amounts than that declared. Following the audit, the DG imposed additional tax liability on the respondents and then revised his computation using an average GPR of 22% based on the respondents' first tax return forms. The Special Commissioners for Income Tax ('SCIT') upheld the figure after refusing to accept the evidence of the first respondent and the respondents' accountant who had argued for lower GPR figures to be imposed. This was because the field audit had revealed the respondents had never had a complete record of their business transactions for the years of assessment. The SCIT held that, in the circumstances, the best evidence it could rely upon was the first returns submitted by the respondents which showed a GPR of between 15% and 26.84%. As such, it accepted that a GPR of 22% as estimated by the respondents was a fair figure to be imposed. Unhappy with that decision, the respondents appealed to the High Court by way of case stated. The High Court allowed the appeal, set aside the SCIT's decision and substituted a GPR of 8% in place of the 22%, which, it held, was incorrect and excessive. The High Court also held, inter alia, that (i) after having imposed additional tax liability on the respondents following the field audit, the DG could not later revise the computation using a GPR of 22% and issue them notices of additional

assessments, and (ii) the DG had used figures which it had itself acknowledged to be wrong to derive the GPR of 22%. The DG appealed against the decision to the Court of Appeal.

Held, allowing the appeal with costs, setting aside the High Court's decision and reinstating the decision of the SCIT:

(1) The High Court's decision was not supported by any evidence. The basis of GPR of 8% was only the opinion of the judge without any basis. It was simply plucked from the air (see para 15).

(2) The basis of GPR of 22% imposed on the respondents and affirmed by the SCIT was just and appropriate pursuant to s 91(1) of the Income Tax Act 1967 and was based on evidence (see para 15).

(3) The doctrine of estoppel cannot apply to the DG and no taxpayer could raise the defence of estoppel against the DG (see para 15).

[Bahasa Malaysia summary

Responden-responden telah menyerahkan penyata cukai pendapatan perniagaan mereka kepada perayu, Ketua Pengarah ('KP') untuk tahun-tahun taksiran 1998 hingga 2001 ('tahun-tahun taksiran') mengisytiharkan ratio keuntungan kasar ('GPR') untuk tahun-tahun taksiran masing-masing sebanyak 28.33%, 26.84%, 16.79% dan 15.81%. Siasatan audit yang dijalankan oleh KP ke atas responden-responden mendapati mereka telah tidak mengisytiharkan pendapatan mereka yang sebenarnya bagi tahun-tahun taksiran. Audit juga menunjukkan responden-responden tidak menyimpan rekod-rekod dengan betul dan lengkap berkaitan transaksi-transaksi perniagaan untuk tahun-tahun taksiran; bahawa mereka gagal untuk mengisytiharkan pendapatan tertentu yang diterima dan bahawa wang yang didepositkan ke dalam akaun bank mereka adalah lebih daripada jumlah yang diisytiharkan. Berikutan audit tersebut, KP mengenakan liabiliti cukai ke atas responden-responden dan kemudiannya menyemak pengiraannya dengan menggunakan purata GPR sebanyak 22% berdasarkan borang-borang penyata cukai pertama responden-responden. Pesuruhjaya Khas Cukai Pendapatan ('PKCP') mengesahkan jumlah tersebut selepas menolak daripada menerima keterangan responden-pertama dan akauntan responden-responden yang mendesak untuk jumlah GPR yang lebih rendah dikenakan. Ini adalah kerana siasatan audit telah menunjukkan responden-responden tidak pernah mempunyai rekod transaksi perniagaan mereka yang lengkap untuk tahun-tahun taksiran. PKCP memutuskan bahawa, dalam keadaan ini, keterangan benar yang boleh digunakan adalah penyata pertama yang diserahkan oleh responden-responden yang menunjukkan GPR di antara 15% dan 26.84%. Oleh itu, ia menerima bahawa GPR sebanyak 22% seperti yang dianggarkan oleh responden-responden adalah jumlah betul untuk dikenakan. Tidak puas hati dengan keputusan tersebut, responden-responden merayu ke

Mahkamah Tinggi melalui kes yang dinyatakan, Mahkamah Tinggi membenarkan rayuan, mengenepikan keputusan PKCP dan mengantikan GPR 22% dengan 8%, yang mana, ia memutuskan, adalah tidak betul dan berlebihan. Mahkamah Tinggi juga memutuskan, antara lain, bahawa (i) selepas mengenakan liabiliti cukai tambahan ke atas responden-responden berikutan siasatan audit, KP tidak boleh kemudiannya menyemak semula pengiraan menggunakan GPR sebanyak 22% dan mengeluarkan notis taksiran tambahan, dan (ii) KP telah mengunakan jumlah yang mana ianya terima sebagai salah berpunca daripada GPR sebaqnyak 22% tersebut. KP merayu terhadap keputusan tersebut kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos, mengenepikan keputusan Mahkamah Tinggi dan mengembalikan keputusan PKCP:

(1) Keputusan Mahkamah Tinggi tidak disokong oleh apa-apa keterangan. Asas GPR sebanyak 8% adalah semata-mata pendapat hakim tanpa apa-apa asas. 'It was simply plucked from the air' (lihat perenggan 15).

(2) Asas GPR sebanyak 22% yang dikenakan ke atas responden-responden dan disahkan oleh PKCP adalah adil dan wajar berikutan s 91(1) Akta Cukai Pendapatan 1967 dan berdasarkan keterangan (lihat perenggan 15).

(3) Doktrin estopel tidak boleh diaplikasikan kepada KP dan pembayar cukai tidak boleh membangkitkan pembelaan estopel terhadap KP (lihat perenggan 15).]

Notes

For cases on business income, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2422–2424.

Cases referred to

Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 4 MLJ 685; [2006] 3 CLJ 123, CA (refd)

Government of Malaysia v Sarawak Properties Sdn Bhd [1994] 1 MLJ 14; [1994] 1 CLJ 514, HC (refd)

Legislation referred to

Income Tax Act 1967 ss 82(1)(a), 91(1) Shcedule 5, para 34

Abu Tariq Jamaluddin (Norhisham Ahmad with him) (Inland Revenue Board) for the Revenue/appellant.

Sukhdev Singh Khandawa (Muhamed Fariz bin Mohd Ali with him) (Azlan Shah Sukhdev) for the taxpayers/respondents.

Abdul Malik Ishak JCA (delivering judgment of the court):

[1] This is the judgment of this court. The facts have been sufficiently set out by the learned High Court judge, the Special Commissioners of Income Tax ('SC') and in the written submissions of the parties. We will not dwell on the facts at length.

[2] Suffice for us to state that the taxpayers ('the respondents') operate a business under the name and style of Hup Soon Trading and their principal activity is the business of trading in all forms of scrap ferrous metals such as wire, battery, drums, irons, steel aluminium, brass copper, plastics and crane metal. It is a flourishing business.

[3] The taxpayers (the respondents) had submitted their return forms for the relevant years of assessment and declared that the gross profit ratio ('GPR') for the relevant years of assessment were 28.33%, 26.84%, 16.79% and 15.81% respectively.

[4] On 31 March 2003, the Director-General of Inland Revenue ('the DG (appellant)') conducted a field audit on Hup Soon Trading in respect of the years of assessment 1998, 1999, 2000 (current year) and 2001. And the DG (appellant) found that:

(a) the taxpayers (the respondents) had not recorded completely all their business transactions;

(b) the taxpayers (the respondents) failed to keep and retain their records of trading for the relevant years of assessment in good order;

(c) the taxpayers (the respondents) did not declare their income of the crane rental for the relevant years of assessment; and

(d) the monies deposited into the taxpayers' (the respondents') bank account were higher than the amount declared.

[5] According to the DG ('the appellant'), the taxpayers (the respondents) had under declared their income for the relevant years of income tax for the following years:

(a) Year of assessment 1998 — RM 16,549,443.27

(b) Year of assessment 1999 — RM 15,103,940.98

(c) Year of assessment 2000 (*Sistem Taksiran Tahun Semasa* ('STTS') or Current Year Tax Assessment) — RM21,270,204.19

(d) Year of assessment 2001 — RM23,213,112.01

[6] The field audit conducted by the DG (the appellant) also revealed that invoices and delivery orders were not available for all the relevant periods as they were destroyed by pests and/or misplaced save for the year of assessment 2001.

[7] In our judgment, by virtue of s 82(1)(a) of the Income Tax Act 1967, it is the statutory duty of the taxpayers (the respondents) to keep all their records in order particularly receipts, payment vouchers, orders and a host of other related documents pertaining to their business enterprise for a period of seven years for tax purposes and this statutory duty cannot be waived.

[8] The field audit that was done on 31 March 2003 showed that the taxpayers (the respondents) failed to keep their records going back to 1996, which should have been done, bearing in mind the seven years embargo.

[9] Now, this appeal before us is in regard to the decision of the High Court delivered on 5 March 2010 which allowed the appeal by the taxpayers (respondents) against the deciding order of the SC dated 29 May 2007.

[10] The deciding order was made solely with respect to the following issue framed for determination of the SC:

> Whether the 22% GPR used by the Revenue in raising the additional assessment for years of assessment 1998, 1999, 2000 (STTS) and 2001 on 9 January 2004 were incorrect and excessive?

[11] The SC held that the GPR of 22% used by the DG (the appellant) was correct in law. The taxpayers (the respondents) filed an appeal against the deciding order and required the SC to state a case for the opinion of the High Court pursuant to para 34 of Schedule 5 of the Income Tax Act 1967. After hearing the parties, the High Court allowed the appeal of the taxpayers (the respondents) and dismissed the decision of the SC and held that the GPR of 22% used by the DG (the appellant) was incorrect and excessive. The High Court applied the GPR of 8% to the relevant years of assessment under consideration.

[12] The High Court also held, inter alia, that:

(a) the DG (the appellant) after having imposed the additional tax liability after the field audit that was carried out, cannot now revise their computation using an average GPR of 22% based on the first return forms and issue the notices of additional assessments to the taxpayers (the respondents);

(b) it is clearly capricious on the part of the DG (the appellant) as it is using figures which the DG (the appellant) had itself acknowledged to be wrong to derive the GPR; and

(c) therefore, the DG (the appellant) cannot be said to have issued the notices of additional assessments according to the 'best judgment' of the DG (the appellant) within the meaning of s 91(1) of the Income Tax Act 1967.

[13] We have perused through the evidence with a fine toothcomb, and it is our judgment that:

(a) the SC took into consideration the evidence of Mr Lai Keng Chong, the first taxpayer ('the first respondent'), who testified that the percentage profit of his business was between 3%–5% but the SC declined to rely solely on his evidence because the account was not properly kept;

(b) the SC also considered the evidence of the accountant who had submitted the accounts of the taxpayers (the respondents) for the relevant years of assessment to the DG (the appellant). But the accountant admitted that the accounts were not verified. And after the field audit, the accountant submitted a revised account for the year 2001 and based on this account the accountant testified that the GPR for that year was 7.78%. This revised account was prepared by the accountant based on the documents submitted by the taxpayers (the respondents) but the accountant said that he did not verify the documents. The SC refused to accept the revised account in order to show the correct GPR of the taxpayers' (the respondents') business because during the field audit it was found that the taxpayers (the respondents) had never had a complete record of their business for the relevant years under assessment. According to the SC, the revised account was in a state of mistrust as it was derived from a cross-reference with a third party, namely, Taiko Metal Sdn Bhd;

(c) by way of a conclusion, the SC had this to say:

> Therefore the best evidence for us to rely is the first return submitted by the appellant (now respondent) when it was first submitted which show the GPR of between 15% to 26.84%. We therefore accepted that the GPR of 22% as estimated by the taxpayers to be a fair estimate.

[14] In sharp contrast, the High Court held as follows:

> The deciding order dated 29 May 2007 as well as the notices of assessment for years of assessment 1998–2001 for the appellants (now respondents) are set aside and pursuant to para 39(c) Schedule 5 of the Income Tax Act 1967, I hereby order that

fresh notices for both appellants (now the respondents) for the relevant years be issued on the basis of GPR of 8% which in my opinion is just and appropriate.

[15] With respect, we say that the decision of the High Court is not supported by any evidence. The basis of GPR of 8% is only the opinion of the learned judge of the High Court and it is without any basis. It is simply plucked from the air. Whereas the basis of GPR of 22% imposed onto the taxpayers (the respondents) and affirmed by the SC is just and appropriate pursuant to s 91(1) of the Income Tax Act 1967 and based on the evidence. It must be borne in mind that the doctrine of estoppel cannot apply to the DG (the appellant) and no taxpayer can raise the defence of estoppel against the DG (the appellant) (*Government of Malaysia v Sarawak Properties Sdn Bhd* [1994] 1 MLJ 14; [1994] 1 CLJ 514; and *Teruntum Theatre Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 4 MLJ 685; [2006] 3 CLJ 123 (CA)).

[16] For all these reasons, we unanimously allow the appeal of the DG (the appellant) with costs of RM15,000. We set aside the decision of the High Court and reinstate the decision of the SC. Deposit, if any, to be refunded to the DG (the appellant).

Appeal allowed with costs, High Court's decision set aside and decision of the SCIT reinstated.

Reported by Ashok Kumar